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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-476

ARLAM CARR, JR., *et al.*,

and

PENELOPE ANNE JENKINS, *et al.*,

Petitioners,

vs.

MONTGOMERY COUNTY BOARD OF EDUCATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statement of the Case 3

History of The Litigation 3

The Montgomery County System 5

1974 Desegregation Proposals 7

The District Court Opinion 10

The Court of Appeals Opinion 11

Reasons for Granting the Writ—

A. The Decisions of the Courts Below Approving a Desegregation Plan Which Leaves Significant Numbers of Black Children In One-Race Schools Conflict with Controlling Decisions of This Court 12

B. The Decisions of the Courts Below Approving An Ineffective Desegregation Plan Which Unequally Burdens Black Children In Order to Reduce The Likelihood of White Flight Conflict With Controlling Decisions of This Court 21

Conclusion 23

PAGE

TABLE OF CASES

Brown v. *Board of Education (Brown II)*, 394 U.S. 294 (1955) 21

Carr v. *Montgomery County Board of Education*, 232 F.Supp. 705 (M.D. Ala. 1964) 4, 14, 15
Carr v. *Montgomery County Board of Education*, 253 F.Supp. 306 (M.D. Ala. 1966) 4
Carr v. *Montgomery County Board of Education*, 289 F.Supp. 647 (M.D. 1968), *aff'd*, 400 F.2d 1 (5th Cir. 1968), *rehearing denied*, 402 F.2d 782, *aff'd sub nom. United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969) 4, 6, 15, 16, 18
Carr v. *Montgomery County Board of Education*, 429 F.2d 382 (5th Cir. 1970) 4, 6, 17
Cooper v. *Aaron*, 358 U.S. 1 (1958) 21

Davis v. *School Commissioners of Mobile County*, 402 U.S. 33 (1971) 3, 12, 13, 14, 20, 21

Ellis v. *Board of Public Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970) 10, 13
Ellis v. *Board of Public Instruction of Orange County*, 465 F.2d 878 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973) 13

Green v. *County School Board of New Kent County*, 391 U.S. 430 (1968) 13n

Keyes v. *School District No. 1*, 413 U.S. 189 (1973) 19, 20

Monroe v. *Board of Commissioners*, 391 U.S. 450 (1968) 3, 21

PAGE

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 3, 4, 8n, 12, 13, 14, 18, 19, 20

United States v. *Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. 1967) *en banc, cert. denied*, 389 U.S. 840 (1967) 6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on April 11, 1975, and June 27, 1975.

Opinions Below

The District Court opinion of May 22, 1974 is reported at 377 F.Supp. 1123 (M.D. Ala. 1974) and is printed in the appendix hereto,[1] App. 1a; the Court of Appeals opinion of April 11, 1975 affirming the District Court is reported at 511 F.2d 1374 (5th Cir. 1975) and is printed in

[1] The appendix to this petition is being printed separately pursuant to Rule 23.1(i) of this Court.

the appendix hereto, App. 44a; the Court of Appeals opinion of June 27, 1975 denying rehearing and rehearing *en banc* is reported at 511 F.2d 1390 (5th Cir. 1975) and is printed in the appendix hereto, App. 78a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1975 (App. 44a). On June 27, 1975, the Court of Appeals denied application by petitioners herein for rehearing *en banc* (App. 78a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

On May 22, 1974, the District Court approved the implementation of a desegregation plan for Montgomery County, Alabama schools submitted to it by the Montgomery County Board of Education. The plan retains eleven virtually all-black elementary schools, enrolling approximately 57% of the system's black elementary school population, and leaves approximately 40% of the County's black junior high school students in virtually all-black facilities. It employs no conventional desegregation measures such as pairing or clustering whatsoever, relying instead upon neighborhood zoning and the assignment of black students previously enrolled in five virtually all-black elementary schools, closed under the plan, to predominantly white schools. No white children, only blacks, are transported under the plan for purposes of desegregation. Alternative plans submitted by petitioners which achieved greater desegregation than the Board's plan through reliance upon pairing and clustering were rejected by the district court based, in part, on its determination that white children would withdraw from the system if as-

signed to traditionally black schools. The district court was affirmed by the Court of Appeals for the Fifth Circuit on April 11, 1975. The questions presented here to this Court are as follows:

1. Do the decisions of the courts below conflict with this Court's decisions in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33 (1971) requiring that such techniques as pairing and clustering of non-contiguous school zones and other measures be resorted to where their utilization achieves the greatest possible degree of actual desegregation;

2. Do the decisions of the courts below conflict with this Court's decision in *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968) holding that apprehensions that white students might flee the system cannot justify the acceptance of a less than effective desegregation plan.

Constitutional Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

History of The Litigation

This school desegregation action was commenced on May 11, 1964 on behalf of the class of black children eligible to attend the public schools of Montgomery, Alabama.[2] On

[2] The history of petitioners' efforts to achieve a unitary system in Montgomery County, Alabama between the date suit was com-

August 18, 1972 petitioners filed a motion for further relief seeking greater desegregation, pursuant to this Court's decision in *Swann, supra,* in light of an enrollment report submitted by the Board to the district court which reflected the continued existence of numerous one-race schools within the Montgomery County system. On August 29, 1973, pursuant to the joint motion of petitioners and the Board, the district court entered an order approving the closing of a virtually all-black elementary school and assigning of its students to a predominantly white facility and the transferring of certain white students from a predominantly white junior high to a predominantly black facility and establishing a schedule for the submission of further suggestions for eliminating "such one-race schools as may be required by *Swann* v. *Charlotte-Mecklenburg Board of Education,* [citation in original omitted] . . .".

On September 7, 1973, a motion to intervene was filed by the American Friends Service Committee and thirty-four Montgomery students. Intervention was eventually granted as to the individual applicants, Jenkins et al (petitioners herein) by order of February 15, 1974.

Pursuant to the district court's orders of August 29, 1973 the Board submitted a desegregation proposal on January 15, 1974. This submission was initially modified on March 29, 1975. The proposed plan of petitioners Carr, et al., herein ("plaintiffs" in the trial court) was filed on

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menced in May, 1964 and June, 1970 is amply chronicled in reported opinions by the district court, Court of Appeals for the Fifth Circuit and by this Court. *Carr* v. *Montgomery County Bd. of Education,* 232 F.Supp. 705 (M.D. Ala. 1964); 253 F.Supp. 306 (1966); 289 F.Supp. 647 (1968), *aff'd,* 400 F.2d 1 (5th Cir. 1968), *aff'd, sub nom. United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969); and 429 F.2d 382 (5th Cir. 1970). The United States was formally designated *amicus curiae* by the district court in July, 1964 and has played an active role in proceedings since that date.

February 16, 1974. Alternative plans were submitted by petitioners Jenkins, et al. herein ("plaintiffs-intervenors in the trial court) on April 1, 1974. After discovery depositions and evidentiary hearings conducted during April, 1974, the Board submitted further modifications of its proposed plan on May 8, 1974.

On May 22, 1974, the district court issued its opinion and judgment approving the Board's plan in its entirety for implementation commencing with the 1974-75 academic year. *Carr* v. *Montgomery County Board of Education,* 377 F.Supp. 1123 (M.D. Ala. 1974), App. 1a. On April 11, 1975, the Court of Appeals for the Fifth Circuit affirmed, *per curiam,* the district court's approval of the Board's plan "for the reasons set forth in its opinion"; one member of the panel, Judge Goldberg, dissented. *Carr* v. *Montgomery County Board of Education,* 511 F.2d 1374 (5th Cir. 1975), App. 44a. Rehearing and rehearing *en banc* were denied by the Court of Appeals on June 27, 1975, Judge Goldberg, joined by Circuit Judges Brown, Wisdom and Thornberry, dissenting. 511 F.2d 1390 (5th Cir. 1975), App. 78a.

The Montgomery County System

Montgomery is a consolidated city-county school system which in 1973-74 operated some 53 schools, including special facilities, enrolling approximately 36,016 students of which 17,042 (47%) were black and 18,974 (53%) were white. Thirty-six elementary schools enrolled 18,449 students (9,279 or 50% black); thirteen junior highs enrolled 9,644 students (4,390 or 45% black); and five high schools enrolled 7,923 students (3,373 or 43% black). Seven of these facilities were located in the County outside Montgomery City. The Board's Fall, 1973 report shows that the system had a variety of grade structures among its various buildings offering a regular instructional program:

30 Elementary schools serving grades 1-6

6 Elementary-Junior High Schools serving grades 1-9

7 Junior High Schools serving grades 7-9

4 Senior High Schools serving grades 10-12

1 Senior High School serving grades 7-12

The Montgomery County schools operated pursuant to a freedom of choice desegregation plan, in conformity with the requirements of *United States* v. *Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. 1967) *en banc*, *cert. denied*, 389 U.S. 840 (1967), during the academic years 1967-68, 1968-69 and 1969-70. In August, 1969 the district court observed that three years of free choice had failed to eradicate the duality of the Montgomery County school system and that other means would have to be found to achieve further desegregation. Of some 68 schools operated at all grade levels at that time, four enrolled only white students and 26 had all-black enrollments. The district court's order of February 24, 1968 pointed out that, out of a school population of approximately 15,000 blacks and 52,000 whites, only 550 blacks and no whites were attending schools enrolling children predominantly of the opposite race under freedom of choice. 289 F.Supp. 647, 649-50.

In 1970, the district court approved a Board desegregation proposal which, as modified in minor detail in 1972 and 1973, assigned students to schools in basically two ways: within the city limits of Montgomery, a geographic zone was established for each school, and students residing within that zone attended the school, except for majority-to-minority transferees. (See, 429 F.2d 382, at 386); outside Montgomery City, students fell within loosely defined "periphery" zones, except for students in extreme southern Montgomery County. Almost all students in "periphery"

zones were transported to school by bus, and most were assigned to schools in the city. In no instance was pairing and clustering, of either contiguous or non-contiguous schools of opposite racial composition, resorted to under the approved Board plan.

In 1973-74, these assignment techniques resulted in the continued maintenance of many racially-identifiable schools. Fifteen of thirty-six elementary schools were 87% or more black; seven of thirteen junior high schools were 85% or more black; and two senior high schools were more than 85% black.

1974 Desegregation Proposals

The district court had three desegregation proposals before it, one prepared by the Board, one submitted by petitioners Carr, et al. (referred to as "plaintiffs' plan" in the opinions below) and one, containing several variations, offered by petitioners Jenkins, et al. (referred to as "plaintiffs-intervenors" plan).

The Board's plan relied upon satellite zoning of black students primarily, reassignment of "periphery" pupils, rezoning, and black school closings, but eschewed any reciprocal transportation of white students to black schools, pairing or clustering. It projected that almost 60% of Montgomery County's elementary students would remain in eleven disproportionately and indentifiably black facilities and that two junior high schools over 70% black would be retained. More specifically, the Board plan proposed closing five previously virtually all-black elementary schools and assigning some of the students from those schools to predominantly white schools and reassigning approximately 400 black students at another virtually all-black school to predominantly white schools. No white elementary school students were to be reassigned to a

school that would remain predominantly black. Consequently, 55% of the black elementary school population was to be enrolled in facilities 87% or more black; 44% of them was scheduled to attend elementary school 93% or more black.

The plan of Petitioners Carr, et al. ("plaintiffs") was prepared by Dr. Gordon Foster, Director of the Florida School Desegregation Center. Dr. Foster's plan was based upon the flexible guideline that racially unidentifiable schools in Montgomery should not, in general, vary more than 15% above or below the system-wide population, although he made "no attempt to press the schools within that mold." [3] His plan dealt only with Montgomery City schools. Dr. Foster prepared a plan based upon the board's 1973-74 zones which fully desegregated all city schools through the use, at the elementary level, of pairing and clustering, with some modification of the zones, primarily through reassignment of "periphery" students. Dr. Foster proposed desegregation of all secondary schools within the city using the same basic techniques as the school board: closing one black junior high, rezoning, and reassigning transported students from the periphery area. Under his plan, elementary schools would have had a 1-3 or 4-6 structure; capacities did require deviation, however, in two pairings, where the division of grades was 1-2, 3-6 and 1-4, 5-6, respectively. Dr. Foster's plan would have also required an increase in the number of pupils being transported in this system, although the times and distances of travel would have been no greater than those for many

[3] In so doing, Dr. Foster acted in the spirit of this Court's holding in *Swann*, *supra*, at 25, that "Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations."

students bused in the south county, in "periphery" areas or to be reassigned across the city under the Board's plan.

The plan of petitioners Jenkins, et al., ("plaintiffs-intervenors") was devised by Dr. Larry Winecoff, former Director of the South Carolina School Desegregation Center. Dr. Winecoff first sought to achieve the maximum desegregation feasible through alteration of attendance zones in a contiguous fashion, within the school board's walking-distance regulations (a 2½ mile radius from any school). He also made use of the existing "periphery" transportation zones. This contiguous rezoning took the form of "strip zones" across the city from east to west, or northwest to southeast. In order to achieve any substantial desegregation at the elementary level with this technique, Dr. Winecoff restructured elementary schools into primary (1-3) and intermediate (4-6) school centers.

He further determined, however, that even with this grade restructuring and alteration of zone lines, 14 elementary schools would remain racially identifiable. He therefore, pursued means of increasing the degree of desegregation at the elementary level, selecting the method of creating satellite, cross-busing sub-zones between certain of the grade 1-3 zones he had drawn. Winecoff's "Plan A", therefore, consisted of the following components: new zone lines and proposals for some cross-transportation, using satellite zones, at grades 1-3; new zone lines at grades 4-6; new zone lines at grades 7-9; and new zone lines for the senior high schools, grades 10-12.

Like Dr. Foster's plan, Plan A required transportation of additional students by the Montgomery County system. But, the distances to be travelled under Dr. Winecoff's plan were well related to those traversed by "periphery area" buses carrying Montgomery County students under the Board's 1970 desegregation plan.

The District Court Opinion

The district court's May 22, 1974 approval of the Board desegregation plan for implementation at the commencement of the 1974-75 academic year, App. 1a., was avowedly premised upon its view that such an arrangement satisfied the tests for the establishment of a unitary system articulated by the Court of Appeals for the Fifth Circuit in *Ellis* v. *Board of Public Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970), App. 25a. There, the Court of Appeals held that a neighborhood assignment plan, under which an elementary school student normally attended the school nearest his home, could pass constitutional muster if it observed a strict proximity rule (ignoring man-made or natural boundaries) and was effective to establish a unitary system. *Ellis, supra* at 207-208. While acknowledging that the Board's plan did not comply strictly with *Ellis'* requirements, the district court observed that the "principle" of that decision was respected, and that, where a school district's desegregation process remained under "judicial scrutiny", such deviations could not be regarded as constitutionally fatal, App. 28-29a. The schools left to serve virtually all-black enrollments under the Board's plan were, according to the district court, "the result of residential patterns and not of the school board's action—either past or present", App. 18a. It remarked approvingly that most of the black children assigned to racially identifiable elementary schools could look forward to attending substantially desegregated junior and senior high school facilities, App. 18a. In defending its preference for the Board's plan over those submitted by petitioners, the district court asserted that the latter plans proposed the establishment of fixed racial quotas for the student population in each school, an approach contrary to prevailing doctrines, as it understood them, and reliance upon satel-

lite zoning, clustering and pairing techniques that would have a disruptive influence upon the system, *infra*, p. 16a. In any event, such approaches would, in the court's view, require cross-city busing which would increase the time and distances students would have to travel and still not "accomplish any effective or realistically stable desegregation", App. 18a. The district court continued in effect existing majority-to-minority provisions and appointed a biracial committee to assist the Board in achieving further desegregation, *infra*, pp. 33, 35-37a.

The Court of Appeals Opinion

In a *per curiam* opinion of April 11, 1975, the Court of Appeals for the Fifth Circuit affirmed the district court judgment in its entirety, App. 44a. Pointing to "reasons set forth" in the lower court's opinion as justifying its action, the Court of Appeals concluded its terse opinion by remarking that it had taken note of the "history of this litigation" and that the system had been and would continue to be under close judicial scrutiny insofar as desegregation was concerned, App. 44a. In the lengthy and scholarly dissent, App. 46a, one member of the panel, Judge Goldberg, set forth an analysis of how the district court's opinion diverged significantly from school desegregation principles established by this Court and his own Circuit, concluding that "the district court erred in adopting the School Board plan, because that plan falls short of the constitutional mark, and because there is no indication of the unworkability of a constitutional remedy." App. 47a.

Reasons for Granting the Writ

A. The Decisions of the Courts Below Approving a Desegregation Plan Which Leaves Significant Numbers of Black Children In One-Race Schools Conflict with Controlling Decisions of This Court.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971), this Court made clear that, in school systems previously segregated by race pursuant to state law, the continued existence of one-race schools should be regarded as a vestige of this prior unconstitutional discrimination, not the consequence of adventitious demographic change. Any attempts to dismantle such dual systems, these decisions teach, may not rely upon approaches, including so-called neighborhood assignment plans, that would perpetuate the effects of past segregative practices. Instead, where necessary "to achieve the greatest possible degree of actual desegregation," such districts should resort to a variety of school assignment practices such as reasonable pairing, clustering and transportation.

The district court in this litigation, effectively disregarded these now-familiar doctrines by ordering the implementation of a "neighborhood assignment plan" for the Montgomery County, Alabama school system which projected the assignment of almost 60% of the system's black elementary students to eleven schools more than 80% black. Pairing, clustering and additional transportation of students were found by the district court to be "impracticable" and unnecessary since the remaining virtually all-black schools were the result of residential patterns completely unaffected by Board conduct, past or

present.[4] This was so, held the district court, despite the judicial record it established as to the existence of a totally segregated system in Montgomery in 1964 and of overt segregative acts by the Board as late as 1968. Petitioners respectfully submit that if a district court, with appellate court approval, can condone the continued isolation of large numbers of black children in segregated schools in a system which has had such a recent history of discriminatory practices as does Montgomery County, Alabama on the ground that the result is dictated by residential patterns, this Court's decisions offer little realistic promise of achieving equal education. The district court by adopting the *Ellis* v. *Board of Public Instruction of Orange County,* 423 F.2d 203 (5th Cir. 1970) neighborhood assignment plan as the standard against which the Board's proposal should be measured, in effect revived an approach to desegregation explicitly rejected in *Swann* and *Davis.* The Court of Appeals, by affirming the lower court and refusing *en banc* rehearing, has left standing a decision that conflicts with many of its own decisions subsequent to *Swann,* including a subsequent order requiring desegregation beyond that achieved through neighborhood assignments in the very case upon which the district court placed such great reliance. See *Ellis* v. *Board of Public Instruction of Orange County,* 465 F.2d 878 (5th Cir. 1972),

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[4] The district court's approach violates not only *Swann* and *Davis,* but *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968) which dictated that only plans promising "realistically to work", and "realistically to work *now*", should be approved and that a school board would have a heavy burden to justify "its preference for an apparently less effective method" at 4399, in the face of more promising alternatives. Here the Board did not offer, nor did the district court require, any explanation, other than generalized objections to pairing and clustering, for its limited proposal. See Judge Goldberg's remarks in this regard, App. 63a-65a.

cert. denied, 410 U.S. 966 (1973). In so doing, the Court of Appeals, after years of faithful adherence to the principles of *Swann,* has decided to encourage trial courts in its circuit to evaluate desegregation plans according to standards it followed prior to *Swann* and *Davis.*

No more effective indictment can be found of the district court's determination that the eleven remaining virtually all-black schools were the consequence of residential patterns, we submit, than the record made by that very court since this school desegregation case was filed in May, 1964. It duly catalogues the variety and persistence of Board actions to create, maintain and perpetuate the racially dual system in Montgomery County, Alabama.

In its July 31, 1964 order, the district court found that:

1. through policy, custom and practice, the Montgomery County Board of Education, operated a dual system based upon race and color. 232 F.Supp. 705, at 707;

2. teachers were assigned according to race. *Id.,* at 707;

3. there were schools designated for and solely attended by white students that were in closer proximity to the homes of black students than were the schools designated for the black students. *Id.,* at 707;

4. students using the transportation facilities—school buses—were segregated according to race and transportation was furnished by the defendants for blacks only to schools attended solely by black students and for white students only to schools attended solely by white students. *Id.,* at 707;

5. the "feeder system" had been set up, was based, and was presently operating on distinctions of race and color. *Id.*, at 707;

6. strong considerations of race had figured in the disbursement of school funds for maintenance, operation and construction in the Montgomery County school system. *Id.*, at 708;

7. the Montgomery County Board of Education had made and was presently making assignments and transfers of students on the basis of race notwithstanding the provisions of the Alabama Placement Law. *Id.*, at 709.

As the district court remarked in a later opinion with respect to the status of desegregation in Montgomery County prior to 1964:

> From 1954—when the Supreme Court of the United States put the Montgomery County School Board and other school boards throughout this country on notice that they could not continue under the law to operate a dual school based on color—until this Court found it necessary to enter an order on July 13, 1964, requiring commencement of the desegregation of public schools in Montgomery County, Alabama, the Montgomery County, Board of Education had taken no steps and had made no plans whatsoever to comply with the law of this land in the area of school desegregation. 289 F.Supp. 647, at 657.

In its order of February 24, 1968, the district court found that:

1. the defendants through their agents—the principals and coaching staffs—had adopted a policy of scheduling interscholastic athletic contests for its

traditionally white schools only with other traditionally white schools, and for its traditionally black schools, only with other traditionally black schools and that this manner of operating the athletic program had and continued to have the effect of influencing the choice of students within the system. 289 F.Supp. 647, at 651;

2. the defendants had continued to construct new schools and expand some existing schools [and that] the construction of new schools with proposed limited capacities geared to the estimated white community needs and located in predominantly white neighborhoods and the expansion of the existing schools located in predominantly black neighborhoods had violated both the spirit and the letter of the desegregation plan for the Montgomery County School System. *Id.*, at 651;

3. the defendants had failed to eliminate the bus routes where there existed overlapping and duplication based upon race. *Id.*, at 651;

4. the defendants could not justify nor excuse any further delay [in the area of desegregation of facilities and staffs] upon the ground that some of the teachers were reluctant to teach in the schools predominantly of the opposite race. *Id.*, at 653; and

5. unless the "freedom of choice" plan were more effectively and less dilatorily used by the defendants in this case, the court would have no alternative except to order some other plan used. *Id.*, at 653.

And, by August, 1969, the district court had concluded that the freedom-of-choice plan in effect since 1967, had not been successful in disestablishing the dual system and

offered no realistic promise of being effective in the reasonably near future. 429 F.2d 382, 384 (5th Cir. 1970).

Contrary to the district court's contentions, most of the eleven virtually all-black elementary facilities left under the plan it approved for the 1974-75 academic year perpetuate the discriminatory practices previously designed to maintain a racially-dual system. As the following chart demonstrates, eight of eleven schools were all-black in 1967-68 (when the court found the Board actively engaged in segregation), remained all-black or virtually all-black through 1968-69, (when the court found that freedom-of-choice was a failure) up to 1973-74 (during the operation of the Board's desegregation proposal initiated in 1970) and were projected to remain all-black by the Board under its plan for 1974-75:

Black Enrollment Ratios

School Name	*1967-68*	*1968-69*	*1973-74*	*1974-75 (Projection in Board's plan)*
Booker T. Washington	100	100	98	98
Carver	100	100	99	99
Daisy Lawrence	100	100	98	98
Dunbar	100	100	87	87
Fews	100	100	99	99
Hayneville Road	100	100	96	95
Loveless	100	100	100	99
Paterson	100	100	94	94[5]

[5] Appendix A to Judge Goldberg's dissent, App. 76a establishes that the Board's predictions of black enrollments for these schools were generally accurate except in the case of three schools where actual black enrollments for fall 1974 exceeded projections: Dunbar (91% black); Fews (100% black) and Hayneville Road (97% black); and his Appendix B points out that two junior high schools scheduled to enroll significant numbers of whites were actually substantially black for 1974-75: Badwin Jr. (73% black projection; 85% black enrollment) and Bellingrath (62% black projection; 81% black enrollment).

Thus, these schools were established before any desegregation, they have always been black schools, and will continue to be unless an effective plan is implemented. Moreover, it is interesting to note that Carver High School (located on the same site as Carver Elementary) and Hayneville Road Elementary were cited by the district court in its February 24, 1968 opinion as examples of facilities that had been expanded by the Board to perpetuate segregation. 289 F.Supp. 647, 651.

This Court observed in *Swann,* that school board policies with respect to expansion, construction, closing and location of school facilities may promote segregated residential patterns:

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the

> short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy. 402 U.S. 1, at 20-21.

More recently, this Court in *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), pointed out similarly that:

> the use of mobile classrooms, the drafting of transfer policies, the transportation of students, and the assignment of facility and staff on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further facial concentration within the schools. *Id.* at 202.

These characterizations aptly describe the extent to which Board policies created and maintained one-race schools in Montgomery County, Alabama. *Swann, supra*, clearly dictates that one-race schools created by Board action must be desegregated:

> . . . In a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contem-

> plates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely non-discriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part. 402 U.S. 1, at 26.

Pairings and groupings of non-contiguous zones may be resorted to even where "administratively awkward, inconvenient and even bizarre" during the interim period designed to eliminate the dual system, in view of the fact that assigning children to schools nearest their homes may not serve to dismantle a system deliberately constructed to enforce racial segregation. 402 U.S. 1, 28.

The district court, heedless of this Court's conclusion in *Swann* and *Keyes* that such schools must be regarded as perpetuations of school board segregative policies and, hence, disestablished, held that eleven virtually all-black schools need not be desegregated since they arose as a result of residential patterns. It based its conclusion not upon any evidence but rather as implicitly true because "the population of Montgomery is so arranged that whites largely live on the east side of the city and blacks on the west" App. 16a. Certainly, if the district court's conclusion that Montgomery County, Alabama one-race schools are the products of segregated residential patterns which its Board had no hand in creating, then any other school system previously segregated by law should have no difficulty satisfying the same standard. It is squarely contrary to this Court's decision in *Davis, supra,* where the existence of residential segregation in Mobile was rejected as a justification for the school board's failure to desegregate its

all-black schools. 402 U.S. 33, 36. Nothing could more effectively assure success to those boards which have been fighting since 1954 to avoid implementing *Brown, supra* than leaving the district court ruling undisturbed.

B. The Decisions of the Courts Below Approving An Ineffective Desegregation Plan Which Unequally Burdens Black Children In Order to Reduce The Likelihood of White Flight Conflict With Controlling Decisions of This Court.

This Court's decisions in *Brown II*, 349 U.S. 294, 300 (1955), *Cooper* v. *Aaron*, 358 U.S. 1 (1958) and *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459 (1968) establish that no more basic error can be committed in efforts to achieve desegregation than to yield to community opposition. In *Monroe*, this Court stated:

> Respondent's argument in this Court reveals its purpose. We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them. *Brown II*, at 300, 99 L.Ed. at 1106. 391 U.S. 450, at 459.

Here, the district court violated this principle.

To the extent that the approved plan achieves any meaningful desegregation, it does so in a fashion that unduly burdens black children and their parents. Under the Board's proposal, five previously all-black schools are the only facilities closed; only black children are assigned to elementary schools enrolling predominantly students of the opposite race; and only blacks are transported for desegregation. The Board's plan imposed this unequal burden upon blacks and the district court approved such

provisions to reduce the level of white opposition to desegregation and discourage "white flight." Hence, the district court concluded that satellite zoning and cross-city busing of white students to desegregate further the remaining virtually all-black schools would not accomplish "stable desegregation" and should, therefore, be dismissed as viable alternative techniques to neighborhood zoning. App. 18a. In so doing, that court improperly rejected constitutionally-acceptable and effective techniques for achieving meaningful desegregation simply because of apprehension that white citizens of Montgomery County, Alabama would find them intolerable.[6]

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[6] As Judge Goldberg indicates in his dissent, in this regard:

> the district court was persuaded by the school Board's attempt to demonstrate that busing of white children into black neighborhoods to attend traditionally black schools would in many cases be met with withdrawal of white students from those schools *Infra,* p. 64a.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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